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# In The
# Supreme Court of the United States

TEXTRON INC. AND SUBSIDIARIES,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit*

## BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE*

This brief *amicus curiae* in support of petitioner is filed on behalf of the Council On State Taxation ("COST").[1] COST is a non-profit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST represents nearly 600 of the largest multistate businesses in the United States; companies from every industry doing business in every state.

Erosion of the work product privilege is deeply troubling to the American business community. Multistate businesses, such as those that are members of COST, routinely engage in a variety of transactions, the results of which regularly result in litigation with the Internal Revenue Service and with one or more of the fifty state departments of revenue. In anticipation of such litigation, businesses routinely engage counsel to evaluate proposed transactions and structures and to opine on the potential outcomes of the anticipated litigation.

Until recently, such opinions and memoranda were generally considered to be protected by both the

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. Petitioner and respondent have each consented to the filing of this brief.

attorney-client privilege and the work product privilege.[2] However, certain newly adopted financial reporting standards often compel businesses to provide copies of such opinions and memoranda to the businesses' auditors and, consequently, the attorney-client privilege is usually waived. As a result, the work product privilege has become the sole protection for attorneys' mental impressions reflected in such documents.

Most COST members are regularly engaged in state tax litigation—and most significantly—often litigating the same issue in several jurisdictions. Accordingly, COST members have a substantial interest in maintaining the sanctity of the work product privilege.

## STATEMENT OF THE CASE

Petitioner's question presented addresses the scope of the federal work product privilege codified as Federal Rule of Civil Procedure 26(b)(3) ("Federal Rule 26(b)(3)"). Federal Rule 26(b)(3) states: "[A] party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)."

Eight federal circuits apply the "because of" test to determine whether a document had been prepared "in

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[2] Like petitioner, we refer here to the "work product privilege" instead of the "work product doctrine" or "work product protection."

anticipation of litigation" under Federal Rule 26(b)(3). *See* Pet. at 12. Under that test, a document satisfies the "in anticipation of litigation" requirement when it is prepared because of the possibility of litigation even if the document was prepared for other purposes as well. *See id.* at 12-13. In conflict with this majority rule, the Fifth Circuit applies the "primary purpose" test under which a document is deemed prepared "in anticipation of litigation" when the "primary motivating purpose" for preparing a document is to assist in litigation. *Id.* at 14-15.

In *United States v. Textron, Inc. & Subsidiaries*, Pet. App. 1a-46a ("*Textron*"), the First Circuit Court of Appeals aggravated the existing split between the majority rule and the Fifth Circuit by creating an altogether new test for determining when a document is prepared in "anticipation of litigation." Under that new test, a document is prepared "in anticipation of litigation" only when it is "prepared for use in possible litigation." Pet. App. 11a. As Judge Torruella demonstrated in dissent, *Textron*'s "for use in" test appears to be significantly narrower than both the widely-accepted and long-standing "because of" test and the Fifth Circuit's "primary purpose" test. Pet. App. 22a.

## SUMMARY OF ARGUMENT

While resolution of the appropriate standard for determining whether a document has been prepared "in anticipation of litigation" is important in the context of federal litigation, such resolution is critical for litigants appearing in the courts in each of the fifty states as the state courts look to interpretations of Federal Rule 26(b)(3) when interpreting their own

work product privileges. If this Court does not resolve the federal circuit split, each of the state courts will be forced to resolve the issue on a case-by-case basis.

The new "for use in" test will compel litigants to waive otherwise valid state-level work product privilege claims. Once a litigant has been required to disclose a document that fails the "for use in" test when litigation occurs in the First Circuit, that litigant will be unable to claim work product protection for that document in another jurisdiction even if the document would have satisfied the "because of" or "primary purpose" test approved by that second jurisdiction. In effect, the availability of the work product privilege in subsequent litigation will depend upon whether a particular issue has already been litigated in a "for use in" jurisdiction.

## ARGUMENT

### I. The Split Among the Federal Courts Will Require Each of the Fifty States to Determine the Scope of the Work Product Privilege on a Case-by-Case Basis.

The decision of the Court of Appeals for the First Circuit in *Textron* confirms that there is a clear split among the federal circuit courts as to the circumstances under which a document is "prepared in anticipation of litigation" and therefore protected from discovery by Federal Rule 26(b)(3). *See e.g., United States v. Adlman*, 134 F.3d 1194 (2nd Cir. 1998) (employing the "because of" test); *United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982) (employing the "primary purpose" test). The gravity of the federal court split cannot be overstated and, in fact, is

exacerbated because the courts in each of the fifty states look to the federal courts for guidance in interpreting their own work product privilege. Without this Court's resolution of the question presented, costly and resource-consuming discovery battles, at both the administrative level and before the state courts, will inevitably result.

Each of the fifty states has adopted a work product privilege that applies to civil litigation in the state's court system.[3] As is to be expected, the states' iterations of the work product privilege are either identical to, or substantially similar to, Federal Rule 26(b)(3). *See, e.g.*, *Soter v. Cowles Publ'g Co.*, 174 P.3d 60, 72 (Wash. 2007) (Washington's privilege is "nearly

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[3] Ala. R. Civ. P. 26(b)(3); Alaska R. Civ. P. 26(b)(3); Ariz. R. Civ. P. 26(b)(3); Ark. R. Civ. P. 26(b)(3); Cal. Civ. Proc. Code § 2018.030; Colo. R. Civ. P. 26(b)(3); Conn. Practice Book 13-3(a); Del. Super. Ct. Civ. R. 26(b)(3); Fla. R. Civ. P. 1.280(b)(3); Ga. Code Ann. § 9-11-26(b)(3); Haw. R. Civ. P. 26(b)(4); Idaho R. Civ. P. 26(b)(3); Ill. Sup. Ct. R. 201(b)(2); Ind. R. Trial P. 26(B)(3); Iowa R. Civ. P. 1.503(3); Kan. Stat. Ann. § 60-226(b)(4); Ky. R. Civ. P. 26.02(3)(a); La. Code Civ. Proc. Ann. art. 1424(A); Me. R. Civ. P. 26(b)(3); Md. Code Ann., Civ. Proc. § 2-402(d); Mass. R. Civ. P. 26(b)(3); Mich. Ct. R. 2.302(B)(3)(a); Minn. R. Civ. P. 26.02(d); Miss. R. Civ. P. 26(b)(3); Mo. Sup. Ct. R. 56.01(b)(3); Mont. Code Ann. § 25-20-26(b)(3); Neb. Ct. R. Disc. § 6-326(b)(3); Nev. R. Civ. P. 26(b)(3); N.H. Super. Ct. R. 36(b)(2); N.J. Ct. R. 4:10-2(c); N.M. Dist. Ct. R. Civ. P. 1-026(B)(5); N.Y. Civ. Practice Law § 3101(d)(2); N.C. Gen. Stat. § 1A-1, R. 26(b)(3); N.D. R. Civ. P. 26(b)(4); Ohio R. Civ. P. 26(b)(3); Okla. Stat. Ann. tit. 12, § 3226(B)(4); Or. R. Civ. P. 36(B)(3); Pa. R. Civ. P. 4003.3; R.I. R. Civ. P. 26(b)(3); S.C. R. Civ. P. 26(b)(3); S.D. Codified Laws § 15-6-26(b)(3); Tenn. R. Civ. P. 26.02(3); Tex. R. Civ. P. 192.5; Utah R. Civ. P. 26(b)(4); Vt. R. Civ. P. 26(b)(3); Va. Sup. Ct. R. 4:1(b)(3); Wash. Super. Ct. Civ. R. 26(b)(4); W. Va. R. Civ. P. 23(b)(3); Wis. Stat. § 804.01(2)(c); Wyo. R. Civ. P. 26(b)(3)).

identical to" Federal Rule 26(b)(3)); *McKinnon v. Smock*, 336 N.W.2d 197 (Iowa 1983) (Iowa's work product discovery limitations are the same as those pursuant to Federal Rule 26(b)(3)); *Kelch v. Mass Transit Admin.*, 400 A.2d 440, 446 (Md. 1979) (Maryland's privilege is "substantially similar to" Federal Rule 26(b)(3)).

Because of such similarities, state courts routinely look to the federal courts' interpretations of Federal Rule 26(b)(3) for guidance when interpreting the state's work product privilege. *See, e.g., Comm'r of Revenue v. Comcast Corp.*, 901 N.E.2d 1185, 1203 n.25 (2009) (because the Massachusetts and Federal work product privileges are identical in all material respects "[i]t is therefore appropriate to look for guidance to Federal interpretations of the Federal rule."); *In re Grand Jury Subpoena for Documents in the Custody of Bekins Storage Co.*, 460 N.Y.S.2d 684, 689 (1983) (because the federal privilege "is the substantial equivalent of the New York work-product rule * * * Federal cases which apply the work-product exemption to Grand Jury proceedings are persuasive precedent."); *Adler v. Shelton*, 778 A.2d 1181, 1187 (N.J. 2001) ("Since [the New Jersey rule] is a carbon copy of [the federal privilege] it is appropriate to look to federal decisions for guidance." (citation omitted)); *Painter v. Peary*, 451 S.E.2d 755, 758 n.6 (W. Va. 1994) ("Because the West Virginia Rules of Civil Procedure are practically identical to the Federal Rules, we give substantial weight to federal cases * * * in determining the meaning and scope of our rules" (citations omitted)); *Hodges v. S. Farm Bureau Cas. Ins. Co.*, 433 So. 2d 125, 131 n.10 (La. 1983) (because the Louisiana work-product standard is the same as the federal standard, "federal decisions construing Rule 26(b)(3)

are persuasive authority."); *Downing v. Bowater, Inc.*, 846 S.W.2d 265, 268 (Tenn. Ct. App. 1992) (the Tennessee and Federal work-product privileges "are sufficiently similar that interpretation of the Federal Rule by the Federal Courts is persuasive authority for our interpretation of the Tennessee Rule."); *Burr v. United Farm Bureau Mut. Ins. Co.*, 560 N.E.2d 1250, 1254 (Ind. Ct. App. 1990) (Indiana courts "will consult federal precedent although not bound by it because of the similarity of our rules with the Federal Rules of Civil Procedure."); *Ashmead v. Harris*, 336 N.W.2d 197, 199 (Iowa 1983) (because the Iowa work product privilege "is modeled on Fed. R. Civ. P. 26(b) * * * the history and cases under the federal rule provide guidance in interpreting the Iowa counterpart."); *Soter v. Spokane Sch. Dist. No. 81*, 174 P.3d 60, 73 (Wash. 2007) ("Where a state rule is identical to its federal counterpart, analyses of the federal rule provide persuasive guidance as to the application of our comparable state rule."); *Gold Standard, Inc. v. Am. Barrack Res. Corp.*, 805 P.2d 164, 168 (Utah 1990) ("In construing our rule, we freely refer to authorities which have interpreted the federal rule."); *Liberty Mut. Fire Ins. Co. v. Bennett*, 883 So. 2d 373, 374 (Fla. Dist. Ct. App. 2004) ("federal decisions [are] persuasive authority because Florida's * * * work product privilege is substantially similar to the federal rule" (citations omitted)).

Making matters even more unpredictable for litigants, state courts rarely limit themselves only to federal decisions from the circuit covering that state; more often, the state courts look to the interpretations of federal courts from several circuits. *See, e.g.*, *Crowe Countryside Realty Assoc. v. Novare Eng'rs, Inc.*, 891 A.2d 838 (R.I. 2006) (Rhode Island work product

decision in which the court relies on guidance from the Third and Sixth Circuits); *Gall v. Jamison*, 44 P.3d 233 (Colo. 2002) (Colorado work product decision in which the court relies on guidance from the Seventh, Fourth, and Tenth Circuits); *Gold Standard, Inc. v. Am. Barrack Res. Corp.*, 805 P.2d 164 (Utah 1990) (Utah work product decision in which the court relies on guidance from the Fifth, Seventh, Ninth, and the D.C. Circuits).

Accordingly, the circuit split exacerbated by *Textron*'s new "for use in" test will wreak havoc in state court litigation. A party seeking the production of documents will most certainly rely on *Textron*'s new "for use in" standard, while a party seeking protection will likely rely on decisions such as *United States v. Adlman*, 134 F. 3d 1994 (2d Cir. 1998), or *In re Grand Jury Subpoena*, 357 F.3d 900 (9th Cir. 2004), for the more inclusive "because of" test.[4] As a result, litigants will face uncertainty in each jurisdiction until the highest court in each of the fifty states considers and addresses the scope of the work product privilege in light of the new "for use in" standard adopted by the First Circuit.

This risk is even more obvious with regard to matters arising within the First Circuit states (Maine,

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[4] With regard to tax accrual workpapers, the split in decisions between Fifth Circuit's "primary purpose" test and the majority of circuits' "because of" test was not particularly troubling to the business community because "the result [for tax accrual workpapers] is the same regardless of which test the court applies." *Regions Fin. Corp. v. United States*, No. 06-895, 2008 WL 2139008 (N.D. Ala. May 8, 2008), appeal dismissed, No. 08-13877 (11th Cir. Dec. 30, 2008).

Massachusetts, New Hampshire, and Rhode Island) because the highest courts of three of those states currently employ the "because of" standard. *See, e.g.*, *Comm'r of Revenue v. Comcast Corp.*, 901 N.E.2d 1185, 1203-04 (Mass. 2009); *Springfield Terminal Ry. Co. v. Dep't of Transp.*, 754 A.2d 353, 357-359 (Me. 2000); *Henderson v. Newport County Reg'l YMCA*, 966 A.2d 1242, 1247 (R.I. 2009). Since *Textron*, however, decisions from the highest court in each Maine, Massachusetts, and Rhode Island—which are binding on the state's lower courts—are in direct conflict with the interpretation of Federal Rule 26(b)(3) enunciated in *Textron*.

In fact, *Commissioner of Revenue v. Comcast Corp.*, 901 N.E.2d 1185 (Mass. 2009), addressed facts quite similar to the facts in *Textron*. There, the Massachusetts Supreme Judicial Court determined that the state's work product privilege prevented the compelled disclosure of the documents at issue. *Comcast* involved a Massachusetts tax audit during which the Massachusetts Department of Revenue examined whether the gain from a particular transaction was properly reflected on Comcast's Massachusetts tax returns and sought the production of documents relating to the transaction. Comcast provided some documents but withheld others claiming that they were protected by the state's work product privilege. The withheld documents had been prepared by accountants at the request of one of Comcast's in-house attorneys and provided "a detailed analysis of Massachusetts tax law and an outline of the feasibility of the potential restructuring in light of applicable Massachusetts law and the potential for [Massachusetts Department of Revenue] litigation." 901 N.E.2d at 1205 (internal quotations omitted).

Relying on the First Circuit's now-vacated decision in *United States v. Textron Inc. & Subsidiaries*, 553 F.3d 87 (1st Cir. 2009) (vacated and replaced by the decision at issue here), for the proposition that the "work product doctrine protects tax accrual workpapers where [the] 'function of the documents was to analyze litigation,'" the Massachusetts Supreme Judicial Court determined that the *Comcast* documents were prepared "'because of' the reasonable possibility of litigation with the [Massachusetts Department of Revenue]." *Comcast Corp.*, 901 N.E.2d at 1205.

Even though *Comcast* reflects the Massachusetts Supreme Judicial Court's interpretation of the scope of the Massachusetts' work product doctrine, members of the business community fear that the Massachusetts Department of Revenue will argue that documents similar to those protected from disclosure in *Comcast* are now discoverable under the revised *Textron* standard.[5] In response, Massachusetts businesses can be expected to assert that those documents continue to be protected, relying on Massachusetts Supreme Judicial Court precedent in *Comcast*. Consequently, taxpayers in litigation with the Massachusetts Department of Revenue are almost guaranteed

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[5] The business community is hopeful that state departments of revenue will be fair and reasonable and will approach discovery in an even-handed manner. Thus, if claiming that the "for use in" standard applies for purposes of the taxpayer's discovery responses, one would hope the state department of revenue would produce any of its documents that failed to meet the new, stricter standard. But without guidance from this Court, such evenness seems highly unlikely.

protracted discovery battles regarding the scope of the work product doctrine.

## II. *Textron*'s Narrower Test Will Result in the Involuntary Waiver of Otherwise Valid Claims of Work Product Privilege in Many Jurisdictions.

With different tests for determining when a document is prepared "in anticipation of litigation," the same document may fail the First Circuit's test and not qualify for protection there but may satisfy another jurisdiction's test and be protected in that second jurisdiction. *Compare, e.g., Regions Fin. Corp. v. United States*, No. 06-895, 2008 WL 2139008 (N.D. Ala. May 8, 2008), appeal dismissed, No. 08-13877 (11th Cir. Dec. 30, 2008) (Federal Rule 26(b)(3) applied to tax accrual workpapers) *with Textron* (Federal Rule 26(b)(3) did not apply to tax accrual workpapers). As a result of the differing treatment, the work product privilege protection that applies to a document in, say, the Eleventh Circuit, would be waived if a litigant was required to provide such document to an adversary in the First Circuit. *See, e.g., United States v. Mass. Inst. Tech.*, 129 F.3d 681, 687 (1st Cir. 1997) ("disclosure to an adversary, real or potential, forfeits work product protection"). In effect, the First Circuit's test could result in waiver in other jurisdictions and render the standards in those jurisdictions virtually meaningless when a litigant is involved in multi-jurisdictional litigation.

This is a significant concern for businesses operating in multiple jurisdictions because it is quite common for the tax effect of a single transaction or structure to be litigated in multiple jurisdictions and,

thus, the same documents would be relevant in several separate cases. For example, one company separately litigated the issue of whether physical presence was required for it to be subject to the state's taxing authority in Massachusetts, Louisiana, Oklahoma, and South Carolina. *Geoffrey, Inc. v. Comm'r of Revenue*, 899 N.E.2d 87 (Mass.), *cert. denied*, 129 S. Ct. 2853 (2009); *Bridges v. Geoffrey, Inc.*, 984 So. 2d 115 (La. Ct. App.), *writ denied*, 978 So. 2d 370 (La. 2008); *Geoffrey, Inc. v. Oklahoma Tax Comm'n*, 132 P.3d 632 (Okla. Ct. App. 2005); *Geoffrey, Inc. v. South Carolina Tax Comm'n*, 437 S.E.2d 13 (S.C.), *cert. denied*, 510 U.S. 992 (1993). Another company separately litigated the issue of whether gain from the sale of a subsidiary was apportionable or allocable in New Jersey, New York City, and New York State. *Matter of Allied-Signal, Inc. v. Tax Appeals Tribunal*, 675 N.E.2d 1234 (1996); *Bendix Corp. v. Director*, 592 A.2d 536 (N.J. 1991), *reversed*, 504 U.S. 768 (1992); *Matter of Allied-Signal, Inc. v. Comm'r of Fin.*, 588 N.E.2d 731 (N.Y. 1991). And another company separately litigated the issue of whether sales of certain securities were to be included in the sales factor denominator of its apportionment factor in Oregon, Tennessee, and Indiana. *Sherwin-Williams Co. v. Dep't of Revenue*, 996 P.2d 500 (Ore. 2000); *Sherwin-Williams Co. v. Johnson*, 989 S.W.2d 710 (Tenn. Ct. App. 1998); *Sherwin-Williams Co. v. Indiana Dep't of State Revenue*, 673 N.E.2d 849 (Ind. Tax Ct. 1996).

Thus, there is a high likelihood that a particular document reflecting attorneys' mental impressions will be relevant in multiple jurisdictions. The involuntary waiver caused by production of a document in a "for use in" jurisdiction will destroy otherwise legitimate work product claims in other jurisdictions.

Moreover, the Internal Revenue Service has entered into information sharing agreements with all or most of the states, and many state departments of revenue have entered into information sharing agreements with each other. Derick Brannan, "Federal, State Information-Sharing Agreements Raise Issues of Concern for Taxpayers," 2004 Tax Management Weekly Tax Report 37 (Sept. 10, 2004) (noting that at least forty-seven states entered into information sharing agreements, called Memorandums of Understanding, with the Internal Revenue Service and that at least forty-four states entered into information sharing agreements with each other). As a result, providing a document that fails the "for use in" test to one tax agency because the work product privilege does not apply could result in that document being provided to other tax agencies in jurisdictions where the document would have been protected under the "because of" test (but for the production in the "for use in" jurisdiction).

Resolving the question presented is thus clearly necessary to prevent the First Circuit decision in *Textron* from cannibalizing the widely-accepted and long-standing work product privilege decisions in other circuits and in the states.

## CONCLUSION

For the reasons stated above, and for the reasons identified by petitioner, this Court should grant the petition for a write of certiorari.

Respectfully submitted.

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